

MOTION FILED
JAN 14 1992

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS CIPOLLONE, individually and as Executor
of the Estate of Rose D. Cipollone,

Petitioner,
v.

LIGGETT GROUP, INC., a Delaware Corporation;
PHILIP MORRIS INCORPORATED, a Virginia Corporation;
and LOEW'S THEATERS, INC., a New York Corporation,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
POST-ARGUMENT BRIEF AND SUPPLEMENTAL
POST-ARGUMENT BRIEF**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1038

THOMAS CIPOLLONE, individually and as Executor
of the Estate of Rose D. Cipollone,
Petitioner,

v.

LIGGETT GROUP, INC., a Delaware Corporation;
PHILIP MORRIS INCORPORATED, a Virginia Corporation;
and LOEW'S THEATERS, INC., a New York Corporation,
Respondents.

On Writ of Certiorari to the
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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
POST-ARGUMENT BRIEF PURSUANT TO RULE 25.6
OF THE RULES OF THE SUPREME COURT**

Because of the potential significance of the question raised by Justices Stevens and Scalia during rebuttal regarding the seemingly asymmetrical scope of the "based on smoking and health" limitation; because the briefs submitted prior to the argument had not addressed that question; and because a dispositive statutory answer is

available once one focuses on the structural role of § 1334 (b) in the overall scheme of the statute as it stood both before and after the 1969 amendment, it would assist the Court and prejudice no one for the Court to consider this short post-argument submission. Accordingly, petitioner respectfully moves this Court, pursuant to Rule 25.6, for permission to file the attached post-argument brief.

Respectfully submitted,

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January 14, 1992

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1038

THOMAS CIPOLLONE, individually and as Executor
of the Estate of Rose D. Cipollone,
v. *Petitioner,*

LIGGETT GROUP, INC., a Delaware Corporation;
PHILIP MORRIS INCORPORATED, a Virginia Corporation;
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Respondents.

**On Writ of Certiorari to the
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SUPPLEMENTAL POST-ARGUMENT BRIEF

Petitioner respectfully submits this post-argument brief to address a matter raised at oral argument that was not discussed in the briefs on the merits: the seemingly asymmetrical scope of the "based on smoking and health" limitation. Given its conceded role as a merely clarifying replacement for former § 1334(b) (Resp. Br. at 23-24 n.28), the current section must be read to mean that, insofar as state law, *on whatever grounds*, requires a "statement relating to smoking and health" in advertising or promotion, and therefore does what the States had in 1965 *lost authority to do with respect to the cigarette industry*, it *ipso facto* treats that industry distinctively and thus is sufficiently "based on smoking and health" to *remain* pre-empted; but, insofar as state law does *not* re-

quire any "statement" at all but merely *prohibits positive misstatements*, and therefore does only what the States demonstrably *had* authority to do prior to the clarifying amendment, it is "based on smoking and health" only if the *basis* of the underlying prohibition itself is a norm specific to smoking and health rather than a norm applicable to society generally.

Even if this Court concluded that the "based on" language played no meaningful role in limiting the preemptive scope of the statute, it should be noted that, pursuant to the express language of § 1334(a) and (b), liability for affirmative misrepresentations wherever made would remain non-pre-empted at least prior to 1969, and liability for affirmative misrepresentations made on cigarette packages or anywhere else except in "advertising or promotion" of cigarettes would remain non-pre-empted to the present. Similarly, liability for failure to warn, so long as it did not require a "statement . . . on any cigarette package" or constitute a "requirement or prohibition . . . with respect to the advertising or promotion" of cigarettes, would remain non-pre-empted to the present.

Respectfully submitted,

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